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In The
Supreme Court of the United States

KAY BARNES, in her official capacity
as Member of the Board of Police Commissioners
of Kansas City, Missouri, et al.,

Petitioners,

v.

JEFFREY GORMAN,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

BRIEF AMICI CURIAE OF THE CITY OF SACRAMENTO AND OTHER CALIFORNIA CITIES IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTEREST OF THE AMICI CURIAE

Pursuant to Rule 37 of the Supreme Court Rules, the California Cities of Sacramento, Alameda, Avalon, Barstow, Carlsbad, Chula Vista, Corte Madera, Cotati, Daly City, Del Rey Oaks, Emeryville, Fresno, Hollister, Huntington Beach, Inglewood, Irvine, Laguna Beach, Lakewood, Lathrop, Long Beach, Los Angeles, Marina, Monrovia, Monterey, Moreno Valley, Placerville, Redlands, Redondo Beach, Rialto, Roseville, Ross, San Anselmo, San Bernardino, San Carlos, San Diego, San Francisco, San Joaquin, San Jose, San Luis Obispo, Santa Clara, Santa Rosa, Sunnyvale and West Covina respectfully submit this brief as *amici curiae* in support of the Petition for Writ of Certiorari of Petitioner Kay Barnes, in her official capacity as Member of the Board of Police Commissioners of Kansas City, Missouri, et al.

Each of the Cities participating as an *amicus curiae* is a member of the League of California Cities.[1] All such cities, through their respective counsel, have consented to the filing of this *Amicus* brief.

Amici have a compelling interest in the legal issues presented in this appeal. Because any punitive damage award against a municipality is paid with finite public funds, the imposition of such an award against a municipality necessarily reduces or curtails the programs, services or activities of the municipality at the expense of innocent municipal citizens and taxpayers.

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[1] As a matter of policy, the League of California Cities does not participate as an *amicus curiae* in its own name, but instead recommends participation by its individual municipal members, which the League has done in this case.

I.

SUMMARY OF ARGUMENT

The long established and unquestioned purpose of punitive damages is to punish and make an example of the wrongdoer. Such damages are by definition not awarded to compensate and are reserved only for the most egregious breaches of acceptable conduct.

The imposition of punitive damages against a public entity does not punish the wrongdoer and has only an attenuated deterrent effect, if any, on the wrongdoing public official. Because funds to pay an award of punitive damages are necessarily paid from public funds, the punishment falls on the innocent taxpayer through a reduction of municipal services and programs or an increase in taxes. The public entity may not be able to obtain reimbursement from the public official and even if indemnification is available, few public officials would be able to pay such an award. Moreover, in cases under the Americans with Disabilities Act or Rehabilitation Act, the conduct upon which punitive damages is predicated (*e.g.*, purposefully failing to comply with "program accessibility" requirements) is often far removed from the period when such damages are imposed. The responsible elected official or employee may no longer be with the municipality. Thus, the award would have no deterrent effect on the absent employee or official. Finally, the remedies already available under the Americans with Disabilities Act and Rehabilitation Act, including injunctive relief, compensatory damages and attorney fees, act as a sufficient deterrent. Imposing punitive damages

under these circumstances does nothing more than transfer taxpayer funds from the public to an already compensated plaintiff and his or her attorney.

The threat of punitive damages also has a deleterious effect on public programs and services. Municipal officials, in assessing whether to combat or resolve questionable suits under the ADA or Rehabilitation Act, may feel constrained to resolve a suit by providing far more of a monetary settlement and injunctive relief than the law requires in order to avoid the potential for a substantial punitive penalty. This is a particular danger in suits under the ADA and Rehabilitation Act because of the broad and somewhat amorphous nature of the requirements. While some would applaud exceeding in monetary or injunctive relief what is required under disability access laws, such relief would come at the expense of innocent citizens and taxpayers.

II.

ARGUMENT

In *Barnes v. Gorman*, 257 F.3d 738 (8th Cir. 2001), the Eighth Circuit Court of Appeals held that punitive damages may be awarded against a public entity in cases brought under Title II of the Americans with Disabilities Act (42 U.S.C. §§ 12132 *et seq.*) and the Rehabilitation Act of 1973 (29 U.S.C. § 794(a)). The Eighth Circuit did so without any discussion of the peculiar concerns which are implicated in permitting punitive damages to be awarded against a public entity including its adverse effect on finite municipal budgets and necessary reduction in municipal services and programs. It also did so

without noting the ultimate (and innocent) victim of such an award – the municipal citizen and taxpayer. Finally, it did so without addressing "the familiar assumption that 'Congress would have specifically so provided had it wished to abolish the doctrine [of municipal immunity from punitive damages].' " *Newport v. Facts Concerts, Inc.*, 453 U.S. 247, 263 (1981) quoting *Pierson v. Ray*, 386 U.S. 547, 555 (1967). Rather, the Eighth Circuit, relying upon *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992) implied the existence of punitive damages as a remedy under Title II and the Rehabilitation Act without consideration of these concerns.

1. THE PURPOSES OF PUNITIVE DAMAGES ARE NOT SERVED IN AWARDING DAMAGES AGAINST A PUBLIC ENTITY:

The nature and purpose of punitive damages makes their imposition against a public entity questionable under any circumstances. The rationale for an award of punitive damages is well established and oft repeated when such an award is challenged: Their purpose is to punish a wrongdoer and deter the wrongdoer and others from similar extreme conduct. *Newport*, 453 U.S. at 266-267 (1981) citing Restatement (Second) Torts § 908 (1979) and W. Prosser, Law of Torts 9-10 (4th ed. 1971). These purposes are simply not served in assessing punitive damages against a public entity.

A. The Innocent Taxpayer, Not The Wrongdoing Tortfeasor, Is Punished:

In assessing punitive damages against a public entity, the punishment ultimately and directly falls on the innocent citizen. A public entity harbors no "malice" and can engage in no despicable or outrageous conduct not otherwise attributable to its officials. The public entity does not belong to the public servants and elected officials who make and carry out the necessary decisions and functions for operation of municipal government. Rather, it is an undeniable predicate of our democratic heritage that government, regardless of the level, is comprised of the governed and exists for their benefit. This separation of the individuals who make or carry out decisions which implicate standards for punitive damages from the people that they serve and who pay the taxes and upon whom the punishment ultimately falls makes the imposition of such damages fruitless and unjust. Penalizing the public entity does nothing more than penalize the citizens who invariably had nothing to do with the particular conduct at issue. Because municipal budgets are finite, a substantial punitive award against a public entity necessarily results in the reduction or curtailment of City services or programs or an increase in taxes.

B. The Imposition Of Punitive Damages Against A Public Entity Has Little Deterrent Effect On The Responsible Public Official:

The imposition of punitive damages against a public entity has only an attenuated deterrent effect, if any, on the responsible public official. Even assuming that the

public entity has a right of indemnification against the offending employee or official, as a practical matter, few public employees would be able to reimburse the public entity. Moreover, by the time punitive damages are imposed, the offending official may no longer be in office or employed by the public entity. Indeed, the inequity of imposing punitive damages against a public entity is particularly egregious in those situations where a public entity has acted with alacrity in taking steps to discipline the official or employee – steps which may include termination or ousting the official from office.

Moreover, the potential or reality of a large compensatory award as well as the concomitant attorney fee award operates as a sufficient deterrent while serving legitimate compensatory functions – something a punitive award does not. These points were addressed by the Court in *Newport*.

First, it is far from clear that municipal officials, including those at the policymaking level, would be deterred from wrongdoing by the knowledge that large punitive awards could be assessed based on the wealth of their municipality. Indemnification may not be available to the municipality under local law, and even if it were, officials likely will not be able themselves to pay such sizable awards. Thus, assuming, arguendo, that the responsible official is not impervious to shame and humiliation, the impact on the individual tortfeasor of this deterrence in the air is at best uncertain.

There also is no reason to suppose that corrective action, such as the discharge of offending officials who were appointed and the public

> excoriation of those who were elected, will not occur unless punitive damages are awarded against the municipality. The Court recently observed in a related context: "The more reasonable assumption is that responsible superiors are motivated not only by concern for the public fisc but also by concern for the Government's integrity." *Carlson v. Green*, 446 U.S. [14], at 21 [(1980)]. This assumption is no less applicable to the electorate at large. And if additional protection is needed, the compensatory damages that are available against a municipality may themselves induce the public to vote the wrongdoers out of office.

453 U.S. at 269.

The ADA and Rehabilitation Act, like 42 U.S.C. § 1983, at issue in *Newport*, have sufficient remedies, without punitive damages, to deter the conscious breach of their requirements by public officials. Imposing punitive damages under these circumstances to an already compensated plaintiff and counsel does nothing more than provide a windfall to the plaintiff and counsel at the expense of the municipal citizen and taxpayer.

2. THE THREAT OF PUNITIVE DAMAGES HAS AN ADVERSE EFFECT ON MUNICIPAL DECISION MAKING:

The threat of punitive damage awards irregardless of an actual award has its own damaging effect on municipalities. "Because juries are accorded broad discretion both as to the imposition and amount of punitive damages (cites omitted), the impact of these windfall recoveries is unpredictable and potentially substantial."

Electrical Workers v. Foust, 442 U.S. 42, 50 (1979). In *Foust*, the Court declined to allow the imposition of punitive damages under the Railway Labor Act for breach of a union's duty of fair representation. In declining to imply the punitive remedy, the Court spoke of the deleterious effect the threat of such an award would have on a union's broad discretion in handling grievances.

> Just as unlimited access to the grievance process could undermine collective bargaining, so too the threat of punitive damages could disrupt the responsible decision making essential to peaceful labor relations. In order to protect against a future punitive award of unforeseeable magnitude, unions might feel compelled to process frivolous claims or resist fair settlements. Indeed, even those unions confident that most juries would hold in their favor could be deterred by the possibility of punitive damages from taking actions clearly in the interest of union members. *Id.* at 51-52.

Analogous concerns exist with respect to municipal decision making – specifically concerning lawsuits under the Americans with Disabilities Act and Rehabilitation Act. Section 504 of the Rehabilitation Act (29 U.S.C. § 794(a)) prohibits discrimination against the disabled in a "program or activity" receiving federal financial assistance. The primary substantive provision of Title II of the ADA (42 U.S.C. § 12132) repeats and somewhat broadens this prohibition, precluding discrimination against the disabled in a public entity's "services, programs, or activities" regardless of the funding source. Both the ADA and Rehabilitation Act are undoubtedly necessary and laudatory legislation with respect to the rights of the disabled.

However, in an effort to dispatch discrimination against the disabled in virtually all areas of government services, programs or activities, the legislation is less than clear in delineating the precise conduct to which a public entity is to conform itself. Neither the ADA or its regulations define what constitutes a "service, program or activity." Though the Rehabilitation Act does define "program or activity" as "all of the operations of [the public entity]," this broad definition and the absence of a definition under the ADA has caused public entities uncertainty over their obligations.[2] The threat of a large punitive award heightens concerns over the obligations and liability of a public entity under the ADA and Rehabilitation Act. As with unions, the threat of a future punitive award may compel a municipality's decision makers to undertake obligations far exceeding those required by the ADA or Rehabilitation Act. While some would applaud a municipality exceeding what the law requires, such excess would come at the expense of other municipal programs and services. Indeed, it is somewhat ironic that a substantial punitive award (such as the one in the instant case) or a settlement to avoid such an award, would provide a windfall to a single disabled individual while limiting or depriving other disabled (and able bodied) individuals of the programs, services and activities

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[2] The constitutional proscription against vague laws is "a basic principle of due process." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Within this doctrine is the idea that persons of ordinary intelligence should have a reasonable opportunity to know what is prohibited and that the standards should be clear enough to curb the danger of arbitrary or discriminatory enforcement. *Id.* at 109.

which the ADA and Rehabilitation Act mandate must be made accessible.

The experience of the City of Sacramento in attempting to decipher its obligations under the ADA and the Rehabilitation Act is undoubtedly not unusual. In 1999, the City was sued by a group of disabled individuals in the matter of *Barden, et al. v. City of Sacramento, et al.*, No. CIV-S-99-497 MLS/JFM (E.D.Cal.) The suit alleged, *inter alia*, that the City had violated Title II of the ADA and the Rehabilitation Act by failing to install curb ramps and failing to make "accessible" its existing sidewalks. According to the plaintiffs in that case, sidewalks are "programs" under the ADA and Rehabilitation Act imposing on the City an obligation to cure "excessive cross slopes," "obstructions in the path of travel" (signs, poles, grates, etc.), narrow widths and broken concrete (in many instances caused by tree roots). Like many American cities, Sacramento's infrastructure dates from the mid-nineteenth century and includes a substantial length of sidewalks. In light of the broad nature of the ADA requirements and the possibility of an economically debilitating obligation being imposed, the City initially sought to negotiate with the Plaintiffs. Unable to satisfy their demands, the City ultimately turned to the court to resolve the issue. The Court agreed with the City holding that sidewalks are not "programs" under the ADA or Rehabilitation Act. The plaintiffs have appealed the Court's ruling to the Ninth Circuit where it is currently pending (No. 01-15744).

The threat of punitive damages being awarded compounds the uncertainty public entities are experiencing with respect to their obligations under Title II of the

Americans with Disabilities Act and the Rehabilitation Act. Public entities exist for the benefit of and serve all their citizens, not just the disabled. The threat of an award of punitive damages coupled with the broad nature of these laws creates a high risk of serving one group in excess of what the law requires at the expense of the municipalities' remaining citizens.

III.

CONCLUSION

For the foregoing reasons, *Amici* respectfully request that the Petition for a Writ of Certiorari be granted.

Dated: December 10, 2001

Respectfully submitted,

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